United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1267

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By mail

No. 74-1267

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM HARRINGTON,

Appellant,

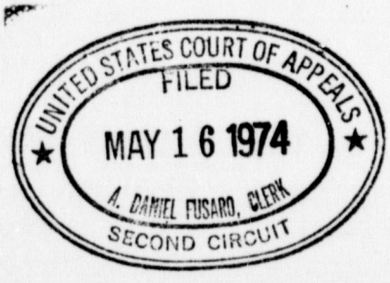
v.

ROBERT FINCH, Secretary of Health,
Education and Welfare,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT



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PRELIMINARY STATEMENT

Appellant, WILLIAM HARRINGTON, appeals from the Memorandum-Decision and Order of Hon. Edmund Port, United States District Judge for the Northern District of New York, entered December 28, 1973.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. In the face of the extenuating and compelling circumstances present in this case, the District Court improperly imposed the doctrine of administrative res judicata to foreclose Appellant's claim for Social Security disability benefits.

II. The Social Security Administration Hearing Examiner erred in his finding that Appellant was not disabled in that substantial evidence exists in the record of the Appellant's disability.

STATEMENT OF THE CASE

Nature of the Case

This is an action for disability benefits pursuant to 42 U.S.C. § 405 (g) of the Social Security Act as amended.

Course of the Proceedings

Appellant, who asserts he has been totally disabled since 1961, (R30, p.1) made claim in 1967 for Social Security disability benefits. (R63, p.18-21) His application was denied initially (R63, p.24-25) and upon reconsideration. (R63, p.29-30) The reconsideration determination dated March 27, 1968, contained a statement that if he desired a hearing he must request same within six months. (R63, p.30)

For approximately eight months Appellant took no further action. He then returned to the Social Security office and was told to submit a second application. This he did (R63, p.31-34) and while the Appellee Secretary took the position that Appellant was now cut off from any benefits by virtue of his earlier failure to timely request a hearing (R63, p.36-37), his claim was allowed to proceed to a hearing. (R63, p.6-15)

The Hearing Examiner both dismissed Appellant's claim on grounds of administrative res judicata and decided that on the merits Appellant was not entitled to disability benefits. (R63, p.15)

The Appeals Council affirmed the Hearing Examiner's action. (R63, p.4)

Disposition in Court Below

On March 31, 1970, Appellant instituted this action in the U. S. District Court for the Northern District of New York.

The Appellee, Secretary of Health, Education and Welfare, moved to dismiss the Complaint on the grounds of lack of jurisdiction and failure to state a claim upon which relief can be granted.

In a Memorandum-Decision and Order dated November 30, 1971, U. S. District Judge Edmund Port, dismissed Appellee's motion to dismiss the Complaint for lack of jurisdiction, denied the motion for summary judgment for failure to state a claim, without prejudice to asserting the defense of res judicata by answer and ordered the Appellee file an answer to the complaint together with a transcript of the proceedings before the Secretary of Health, Education and Welfare.

Upon receipt of the answer and the record, Appellant moved for summary judgment reversing the Appellee and ordering the granting of benefits. Appellee then cross-moved for summary judgment dismissing the Complaint on grounds of administrative res judicata or, in the alternative, on the merits.

By Memorandum-Decision and Order entered December 28, 1973, Judge Port denied Appellee's motion for summary judgment, granted Appellant's motion for summary judgment on the grounds of administrative res judicata and ordered that judgment be entered in favor of the Appellant dismissing the Complaint. (R105)

Statement of Facts Relevant to Issues Presented

Since 1961, Appellant has suffered from ear disease and neck infections and other disorders, the cumulative effect of which has been to render him totally disabled from engaging in substantial gainful employment. (R30, p.1, para. 2)

The Appellant is now 56 years old. He was born on February 22, 1918, in the Village of Warsaw, New York. At an early age, his father, who was a blacksmith, moved his family to Cazenovia, New York, where Appellant grew up. He attended schools in Cazenovia, until the seventh grade when he quit to go to work. He first worked at a number of odd jobs such as mowing lawns, etc. He later worked at the Crouse-Hinds Company in Syracuse, New York, as a laborer. (R30, p.1, para. 1)

In January, 1944, the Appellant was inducted into the United States Navy, where he served honorably until December of 1945. During his Naval service, he served as a deckhand and gun loader aboard numerous amphibious vessels, such as LSTs and saw duty in the South Pacific theatre. (R63, p.44-45)

Following his release from Naval service, Appellant returned to the Crouse-Hinds Company as a laborer, until he was laid off. He then worked various jobs in and around Syracuse, New York, including the Loblaws Warehouse as a janitor-watchman; the General Electric Company; the Pepsi-Cola Company; Dave's Trucking Service; and more recently at Precision Castings Company in Fayetteville, New York, as an inspector of castings. (R63, p.48) His last employment was with the Home Food Service in DeWitt, New York, from which

he was forced to terminate employment in 1961 due to his disabled condition. (R63, p.49)

The Appellant's various physical complaints are best described in the various applications he has made for Social Security benefits:

On July 24, 1967, he complained of "right eardrum gone; left side of neck swelling; and pain in left chest area". (R63, p.18)

During an interview on the same day, he complained of headaches; earaches; hole in his eardrum; hearing problem; swelling on left side of neck, which swelling extended down into his chest; pain in his neck; pain in his left chest; breathlessness from mounting stairs; hemmorrhoids; cramps in the backs of his legs; left knee which gives out when he walks and sleeplessness. (R63, p.46-49)

On January 4, 1968, on his first reconsideration request, he complained of headaches; earaches; pain in the back of his neck and down into his arms and chest; short-windedness and easily tired. (R63, p.26)

At his interview on the same day, he again mentioned constant headaches and earaches; neck swelling; pain in his neck and short-windedness on the least exertion. (R63,p.53)

On December 4, 1968, when filing a second application for disability benefits, Appellant complained of hearing; chest; back; ulcers and leg conditions. (R63,p.31-34)

At the accompanying interview, held on January 8, 1969, he complained of swelling and aching in his neck; numbness in his left arm; pains in chest getting worse; pain in the back on exer-

tion; shortness of breath, which condition was getting worse; aches in his stomach if he didn't eat the right foods and having to wear elastic stockings on his legs, which ached at night, and also dizziness on bending. (R63, p.57-60)

On June 19, 1969, on filing his second request for reconsideration, he complained of headaches; earaches; back pain on the least exertion; dizziness on bending and stomach pains on his left side. (R63, p.38)

When interviewed the same day, he complained of pains in his chest, now more severe; increased back pain; shortness of breath; tires more easily; weight loss from 168 lbs. to 138 lbs.; and no appetite. (R63, p.61-62)

Appellant's above listed complaints, as he describes them, are summarized in layman's terms as follows:

Head - hole in eardrum
earaches
hearing problems

Neck - swelling
pain

Back - pains in back

Chest - pains
breathlessness on exertion

Arms - pain
numbness in left arm

Intestinal tract - hemmorrhoids

Stomach - ulcers
aches on left side

Legs - pains
cramps in back
ache at night

Miscellaneous - dizziness on bending
tires easily
weight loss
sleeplessness

Appellant's principal problems stem from a disease in his right ear and infections in the glands on the left side of his neck. The cumulative effect of the above described ailments on Appellant's ability to work is regarded as significant.

Since 1967, Appellant has attempted to obtain disability benefits under Title II of the Social Security Act. A brief history of these attempts follows:

On July 24, 1967, Appellant filed his first application for disability benefits. (R63, p.18-21)

On October 25, 1967, his request was denied. (R63, p.24-25)

On January 4, 1968, Appellant filed his first request for a reconsideration of his case. (R63, p.26)

On March 27, 1968, Appellant was notified that upon reconsideration his request for disability benefits was still denied. (R63, p.29-30) This two-page single spaced letter contained a notice in its last paragraph advising Appellant that if he desired a hearing, he would have to request same not later than six months from the date of the notice i.e. by September 27, 1968. The danger of Appellant's rights to disability benefits being extinguished by application of the doctrine of res judicata, was not mentioned in the letter.

For reasons that do not appear in the record, Appellant failed to request a hearing by September 27, 1968, instead on December 4, 1968, he returned to his Social Security office to seek further advice and assistance concerning disability benefits. He advises that a woman employee of the office told him that the proper procedure would be for him to fill out a new application. He states that he told the employee that he had no new information to present

but that she told him that he should submit a new application anyway. (R30, para.6)

On January 19, 1969, Appellant was advised that his second application had been denied. (R63, p.24-25)

On June 19, 1969, Appellant submitted his second request for a reconsideration of his case. (R30, para. 7; R63, p.38)

On June 27, 1969, Appellant was notified that upon reconsideration his second application had been denied. He was again advised that he had six months in which to request a hearing. (R63, p.29-30)

For the first time Appellant sought legal assistance. He went to the Onondaga Neighborhood Legal Services office in Syracuse. With the help of a staff attorney, on August 20, 1969, submitted a request for a hearing. (R30, para. 8) The Legal Services attorney merely filled out a form for Appellant, waiving his right to appear at the hearing and requesting a decision on the evidence before the Hearing Examiner. (R63, p.16-17)

On December 18, 1969, Hearing Examiner Jacob Friedes of the Social Security office in Buffalo, New York, rendered his Order of Dismissal and Decision. (R63, p.8-15) Accompanying this document were notices of the Hearing Examiner's actions advising that a request for a review of either action must be filed within sixty days. (R63, p.6-7)

On January 19, 1970, Appellant filed his request for a review of the Hearing Examiner's actions. (R63, p.5)

Eleven days later, on January 30, 1970, the Appeals Council of the Bureau of Hearings and Appeals in Washington, D.C., advised Appellant that his request for a review of the Hearing Examiner's

Decision had been "carefully considered" and that the Council had concluded that the Decision of the Hearing Examiner was correct, and that accordingly the Hearing Examiner's Decision stood as a final decision of the Secretary in his case. Appellant was further advised that if he desired judicial review he had sixty days in which to commence a civil action in the United States District Court under §205 (g) of the Social Security Act. (R63, p.4)

Still feeling that he was in fact totally disabled since 1961 and feeling that the Hearing Examiner had made an erroneous ruling in his case, Appellant in early March, 1970, engaged the services of his present attorney. On March 31, 1970, the instant action was commenced in the Northern District of New York.

On July 17, 1970, the Appellee moved to dismiss the Complaint on the grounds of lack of jurisdiction, and that Appellant failed to state a claim upon which relief could be granted.

On November 30, 1971, Judge Edmund Port, in a Memorandum-Decision and Order, denied Appellee's motion to dismiss.

In March of 1972 (exact date not certain), Appellee served its Answer upon the Appellant together with a certified copy of the transcript of the record in this matter. (R63, p.1-108) Appellee raised in its Answer the affirmative defenses of administrative res judicata in that the first reconsideration determination had become final owing to Appellant's failure to timely request a hearing and also the defense that Appellant's claim was not supported by substantial evidence of his disability.

On August 30, 1972, the Appellant moved for a summary judgment granting him his benefits. He pointed out the unfairness inherent in denying his claim without a hearing and also reviewed the

evidence before the Hearing Examiner pointing out that this evidence did in fact constitute substantial proof of his disability.

On December 11, 1972, Appellee cross-moved for dismissal of the Complaint on the grounds that Appellant's claim is barred by administrative res judicata and that the decision of the Secretary was supported by substantial evidence.

In his Memorandum-Decision and Order entered December 28, 1973 (R105), Judge Port granted Appellee's motion to dismiss on the grounds of administrative res judicata holding that the Appellant's failure to request a hearing following his first reconsideration determination in March of 1968 thereby foreclosed any further attempts by Appellant to secure disability benefits under the Social Security Act. Judge Port further noted (without discussion) that in any event, the Secretary's decision should not be disturbed as it was supported by substantial evidence.

Judge Port held the provisions of Social Security's res judicata regulation 20 C.F.R. §404.937 strictly applied. He stated that Appellant's lack of education and counsel in no way compelled relaxation of the res judicata regulation. He pointed out that Appellant had been able to request a reconsideration of the initial denial of his application and that this proved that he had the capability to understand the communications from the Social Security Administration thereby implying that he should have known enough to request a hearing within six months. The court stated that Appellant's lack of education was an "excuse" which he characterized as an "afterthought." (R105, p.10) The court laid principal stress on the Second Circuit's decision in Thompson v. Richardson for the proposition that admini-

strative res judicata can only be relaxed in exception cases and stated that Appellant's circumstances were not "exceptional factors."

Having held that res judicata applied, the court declined to discuss the evidence in the record as to Appellant's disability.

On January 24, 1974, Appellant filed his notice of appeal.

ARGUMENT

I. IN THE FACE OF THE EXTENUATING AND COMPELLING CIRCUMSTANCES PRESENT IN THIS CASE, THE DISTRICT COURT IMPROPERLY IMPOSED THE DOCTRINE OF ADMINISTRATIVE RES JUDICATA TO FORECLOSE APPELLANT'S CLAIM FOR SOCIAL SECURITY DISABILITY BENEFITS.

Appellant, WILLIAM HARRINGTON, who went no further than the seventh grade in school and who served as a Seaman First Class in the U. S. Navy during World War II (R30, p.1; R63, p.44-45), has a subsequent history of work as a janitor and castings inspector. (R63, p.10) He has not worked since 1961, claiming to be disabled by ear disease and neck infections and other disorders. (R30, p.1)

In 1967, without the aid of attorney, he sought disability benefits under Title II of the Social Security Act as amended, from the local Social Security office in Syracuse, New York. He submitted an application (R63, p.18-21), which was denied. (R63, p.24-25) He submitted a request for reconsideration of the Secretary's decision (R63, p.26) and this too was denied. (R63, p.29-30)

The reconsideration determination dated March 27, 1968, was a two-page letter, single spaced, which contained in its final paragraph an advisory that he had six months to request a hearing. (R63, p.30) For reasons not shown in the record, the Appellant did nothing until eight months had transpired (2 months beyond the deadline); when he went back to the Social Security office to inquire further about disability benefits.

He was then given another application and told to apply for a second time. The second application (R63, p.31-34), although turned down at every stage, was allowed to proceed on appeal through the hearing stage and thus became the basis for this action.

Owing to his failure to timely request a hearing on his first application for disability benefits, the Appellee has consistantly taken the position that in the absence of new evidence the first reconsideration determination has become final and is administratively res judicata as to any further attempts by Appellant to secure disability benefits under the Social Security Act.

The res judicata regulation which Appellee cites to bar the Appellant is 20 C.F.R. §404.937 which provides:

> "Dismissal for Cause.
>
> The Administrative Law Judge may, on his own motion, dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:
>
> (a) Res judicata. Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or review, or to commence a civil action with respect to such determination or decision...(Italics added)"

District Court accepted the Appellee's res judicata argument, noting in passing that:

> "It is unnecessary to discuss the alternative ground except to note that the Secretary's decision could not be disturbed in any event as it is supported by substantial evidence." (R105, p.2)

Thus this case on appeal stands for the bare proposition that a citizen seeking Social Security benefits who during the earl stages of his quest, before even reaching the hearing stage, for reasons not

clear fails to timely proceed (in this case delays for two months), he is absolutely and forever foreclosed from those benefits (barring new evidence) even though a court might find that he is in fact entitled to the benefits he seeks.

Although in this particular case a second application was allowed to proceed through the hearing stage, the lower court based its decision solely on the facts surrounding the first application. How much the lower court's decision may have been influenced by the results of the Hearing Examiner's decision on Appellant's second application is not known. Since the court declined to discuss the substantial evidence, the res judicata argument must be squarely faced.

Appellant has never denied his failure to request a hearing within six months. Nor has he seriously contended that his second application contains new and material evidence thus overriding the res judicata bar. (R63, p.38, where he states that he has no further medical evidence to submit.)

What this case does tell us about Appellant is that he is a man of limited education who has worked at a number of low level jobs through his life. At the time of his first application and specifically at the time of his administrative "failure timely to request reconsideration" he was not represented by counsel. His only "counsel" in interpreting the Social Security regulation and evaluating his chances was his own, plus whatever assistance he could get from the Social Security Administration.

The lower court pointed out and made much of the fact that the Appellant apparently had enough intellectual ability to request a reconsideration of the denial of his first application. (R105, p.10)

The court then argues that having shown this ability, he should have had similar ability to request a hearing within six months of the date of the denial of his claim upon reconsideration.

The reconsideration determination letter of March 27, 1968, bears critical examination. (R63, p.29-30) It is two-pages long, single spaced. The admonition to request a hearing within six months is incorporated in the last paragraph. Is it fair to expect a claimant with a seventh grade education, without benefit of legal advice to properly heed this warning? Perhaps so.

But is it also fair to expect such a claimant to properly evaluate the legal implications of this letter coupled with the previous denial of his claim and make a proper determination as to his chances of successfully pursuing his claim? Could it not be that in his own mind at least Appellant thought that he had in fact lost out on his disability benefits even if as a matter of law and fact he might actually be entitled to them?

At any rate, as a result of his two months delay, the Social Security Administration has successfully argued that in the interest of "administrative finality" Appellant must for all time be foreclosed from his Social Security benefits.

The principal decision relied upon by the lower court in holding against the Appellant is this court's decision in Thompson v. Richardson 452 F.2d 911 (2nd Cir. 1971). In denying Appellant-Thompson's request for Old Age Benefits on the grounds of administrative res judicata this court stated:

> "***It is firmly established that, in the absence of exceptional factors, administrative finality (or administrative res judicata) forecloses reopening or review of adverse determinations which have become final under the regulations."

A comparison of the Thompson case with the instant case reveals some interesting differences - Appellant is a former janitor and die castings inspector with a seventh grade education; Sawyer Thompson was a lawyer! Appellant delayed two months beyond the deadline requesting a hearing; Thompson delayed his request for Old Age Benefits for over eight years!

Should the same standard imposed by this court on a lawyer who delays his claim for some eight years apply to the Appellant? Should the Appellant thus be similarly cut off in the interest of "administrative finality" or should not this case be deemed one of those exceptional or compelling cases justifying a relaxation of the res judicata requirements?

What must be decided here is whose interests are to be considered paramont - the interest of the bureaucracy in clearing its desks and closing out its files or in the interest of the individual citizen who says that he is totally disabled and claims his disability benefits under the Social Security Law which he has supported through his own contributions? (R63, p.42-43)

Finally it must be remembered that the Social Security Act is social legislation which should be liberally construed. The res judicata provisions have been relaxed in the past (see Staskel v. Gardner 274 F.Supp 861 (E.D. Pa. 1967); Gilliam v. Gardner 284 F.Supp 529 (D.S.C. 1968); and Grose v. Cohen 406 F.2d 823 (4th Cir. 1969)), and although admittedly the prevailing trend is in favor of their strict application (see Leviner v. Richardson 443 F.2d 1338 (4th Cir. 1971), circumstances such as are found in this case should compel the court to relax the harshness of the doctrine in the interest of justice.

II. THE SOCIAL SECURITY ADMINISTRATION HEARING EXAMINER ERRED IN HIS FINDING THAT APPELLANT WAS NOT DISABLED IN THAT SUBSTANTIAL EVIDENCE EXISTS IN THE RECORD OF THE APPELLANT'S DISABILITY

By way of introducing this second issue it must be recalled that although the Appellant's claim was dismissed by the lower court for failure to time proceed on his first application, he did in fact file a second claim which the Social Security Administration allowed to proceed up to and through the hearing stage.

The District Court held that Appellant was foreclosed by res judicata which thereby obviated any discussion of the substantial evidence in this case.

In that the crux of any Social Security disability claim is the weight of the evidence and that in this case the Appellant strongly feels that he is in fact disabled, it is deemed necessary and proper on this appeal to discuss the evidence which was before the Hearing Examiner.

This breaks down into two sub-issues owing to the fact that in order to qualify for a period of disability Appellant must first prove that he was totally disabled prior to June 30, 1965, the date he last met the earnings requirements under the Act. We must therefore, first examine the record to discover what medical evidence of Appellant's condition prior to June 30, 1965, exists to establish that he was in fact disabled. We should then review the record for evidence of Appellant's condition subsequent to that date to see if his disability has in fact continued.

The pre-June 30, 1965, evidence in the record is not extensive. It consists of three items: two letters from Dr. Leo Baum, Appellant's family physician, who had been treating him for several years for his condition and who continued to treat Appellant until his death in 1969, and one set of records from the Veterans Administration Hospital in Syracuse, New York, covering Appellant's ear operation in 1961.

Dr. Baum's first letter is dated May 27, 1959 (R63, p.82). In it he states that he had been treating Appellant for the last five years for "very frequently recurring infections in the region of his neck and face." During these flare-ups, the Appellant is described by Dr. Baum as running "a temperature, has chills and sweating and severe pain in the infected region. These flare-ups last usually two to three days and leave the Appellant in a weakened condition." Dr. Baum's tenative diagnosis of Appellant's condition is that of "congenital (teratological) cysts with incomplete fistulas . . ." Dr. Baum further stated that Appellant also suffered from "an old odus otitis media (ear disease) of the right ear which flares up from time to time, causing bleeding and pus formation and severe pain." Furthermore, Dr. Baum found Appellant to be suffering from "pain in his muscles and joints, which possibly are the result of a focal infection, as chronic mastoiditis or retention of pus in fistulas." Dr. Baum concluded by saying that Appellant "is certainly not employable because of the above mentioned, very frequent flare-ups which make it impossible for him to work during these times. Furthermore, Mr. Harrington is not able to do any exerting work because of attacks of angina pectoris which are elicited by

any undue exertion." It should be noted that Dr. Baum, a graduate of the Medical School of Ludwig-Maximilliam University, Munich, Germany (R63, p.92) had been treating Appellant for five years and certainly was more familiar with Appellant's condition at that time then any other physician. He every clearly states that Appellant is not employable, which should lead one to conclude that Appellant was disabled and unable to work.

In his second letter dated June 10, 1963 (R63, p.83), four years later, Dr. Baum states that he has been treating Appellant "for a flare-up of his otitis of the right ear, and an inflamatory condition with swelling and pain at the left side of his neck. In addition to that, he developed symptoms of sciatica, arthritis in various joints of the body and spacticity of leg and shoulder muscles. He also has symptoms of angina pectoris." It was Dr. Baum's impression that Appellant "is suffering from a chronic inflamatory process with frequent flare-ups, manifesting themselves in a (non-odorous) discharge from the right ear and swelling of the left side of the neck in alternating intervals." In referring to his previous letter he renewed his opinion that "these regularly recurring inflamations are caused by congenital cysts with incomplete fistulas . . ." and that "the sumptoms of arthritis, sciatica, muscle spasms and angina pectoris are the results of a focal infection as chronic mastoiditis or retention of pus in fistulas and cysts." Dr. Baum's final conclusion which he based on previous and present findings is that "William Harrington is employment (sic) only in a very limited way, which actually makes him <u>totally and permanently disabled</u>." (emphasis mine) Again, the record shows that Appellant's personal physician, some two years before the June 30, 1965 cut-off

date for a period of disability, is reporting that Appellant is totally and permanently disabled.

Between Dr. Baum's 1959 and 1963 reports occurs the history of Appellant's ear operation at the Syracuse VA Hospital in early 1961 (R63, p.65-68). Appellant received a right myringoplasty skin graft on January 11, 1961. The VA's final diagnosis was "Perforated tympanic membrane right ear." Treated, improved." (R63, p.65) In the post-operation out-patient progress report (R63, p.66-68) the examining physicians' first concluded on April 3, 1961, that Appellant's eardrum was "completely healed" but on May 1, 1961, the doctor noted "perforation seen today." Subsequent examinations during May, June and July of 1961, at the Out-Patient Clinic showed that Appellant's eardrum had not completely healed from his January operation and that a perforation continued to be seen. He was discharged from the Out-Patient Clinic on October 2, 1961. In no way does this VA evidence reach the larger issue as to whether Appellant was totally disabled or not. The best that can be said of this record is that it support Dr. Baum's findings that Appellant suffered from a right ear disease which was severe enough to necessitate the 1961 operation, and that following the operation he still suffered from a perforated right eardrum.

In summarizing the pre-June 30, 1965 evidence, we find that Dr. Baum, Appellant's personal physician of many years, twice described Appellant's many infirmities and declared him to be totally disabled. The VA records confirmed one of these infirmities (ear trouble), that it was unsuccessfully treated by operation. No where does the VA comment upon Appellant's ability to perform work. It is therefore

difficult to see how Hearing Examiner Friedes reached his conclusion that "claimant's impairments either singly or in combination have not been shown to have been of such severity on or before June 30, 1965, as to have prevented him during such period from returning to his former work as an inspector or porter." (R63, p.15)

The second sub-issue is whether or not the Appellant has continued to be disabled. The record shows us that there is more evidence available during the post-June 30, 1965, than was available prior to that date. This evidence consists of five more reports from Dr. Baum; records of the State University of New York during 1967-1968; records of the Veterans Administration Hospital in Syracuse, New York, during 1967 where Plaintiff underwent a second ear operation; two Disability Determination and Transmittal reports from the Social Security Administration in 1967 and 1968; a report of a single examination of Appellant by Dr. Harvey Hayman in 1968; and a single examination of Appellant by Dr. Sherwin Radin, also in 1968.

Taking these reports in order, we first find that during the period February 13, 1967 to January 22, 1968, the Appellant was treated as an out-patient at the Upstate Medical Center Clinic in Syracuse, New York (R63, p.69-73). He was again found to have a perforated right eardrum. Tests for heart trouble and cervical spine problems were both negative. This series of visitations indicates that in 1967 the Appellant's physical problems were persisting. The negative findings as to heart trouble and cervical spine trouble should not be regarded as substantial evidence of Appellant's good

health in that he had never alleged that heart trouble and spine trouble were his major disabling health problems.

Appellant returned to the VA Hospital in Syracuse in 1967 for his second ear operation (R63, p.75-81). In the Hospital summary (R63, p.75) the examining physican found "a very badly scarred canal wall and perforated tympanic membrane with old chronic drainage present and two small perforations just posterior to the long process of the themalleolus." After the operation, the doctor reported that "due to conditions found, the tympanic membrane was not completely closed" and the Appellant was "treated essentially to clear the ear disease." A future operation was planned. During the post-operative out-patient period Appellant continued to complain of his recurring pain (R63, p.78) These 1967 VA reports clearly indicate that Appellant's ear condition continued to be troubling him; that he was required to have a second operation; and that still a third operation would be necessary. These reports contain no evaluation as to Appellant's ability to perform his normal work.

In the fall of 1967, Dr. Baum submitted three reports in close succession. In a letter dated September 9, 1967 (R63, p.84-85), he stated with regard to the May, 1967, second ear operation: "No effect on the (Appellant's) general condition has resulted from this operation nor could it be expected." He further reported that: "I am continuing treating Mr. Harrington for frequent flare-ups of his otitis of the right ear, and inflamatory condition with swelling and tenderness in the region of both sternocleoid muscles occurring in intervals of three to six weeks accompanied by pain and fever,

lasting two to three days, leaving the patient in a very weakened condition. I am repeating my previously expressed opinion that those attacks are caused by congenital cysts with incomplete fistulas." Although Dr. Baum stated that examinations by specialists and surgical exploration had not yet substantiated his diagnosis, he emphasized that: "The fact . . . remains that these attacks occur with regularity and unless the patient is being kept under treatment with Pencillin and Streptomycin. The flare-ups of muscle and joint pains as well as the leg cramps and chest pains (angina pectoris) can be explained on the basis of a focal infaction originating from pus retention in the fistulas or a chronic mastoiditis." It was Dr. Baum's conclusion that Appellant, was "only employable in a very restricted capacity, and only under simultaneous continuation of the injection treatments as mentioned above." He further stated that he would prefer to "call this kind of minimal employability 'total disability' because of the deteriorating effect, which the unavoidable frequent interruptions of this patient's work will have on his mind." Clearly, this letter is further substantial evidence that the medical conditions which supported the conclusion that Appellant was totally disabled prior to June 30, 1965, continued on into 1967.

Dr. Baum repeated his diagnosis of Appellant's condition in a medical report written approximately September 15, 1967, for the Social Security Administration (R63, p.86-87) and on September 27, 1967, apparently as a result of a telephone inquiry by a representative of the Social Security Administration, he again summarized the Appellant's condition. This is an excellent summary of Dr. Baum's

evaluation of Appellant's physical condition and appears at R63, p.88 of the record. These later reports by Dr. Baum certainly do not mitigate from his previously expressed opinions concerning Appellant's disabling condition and ability to perform his normal employment.

In the October 10, 1967, Disability Determination and Transmittal by the Social Security Adminstration (R63, p.22-23), the Examiner found that the Appellant's ear operations were "unremarkable, except for some diminished hearing in the right ear." The Examiner continued that the evidence in the case was "felt to reveal" that while the Appellant suffered from a significant condition it should not have disabled him before the day that the quarters of coverage were last met, viz: June 30, 1965. This evaluation is not cited by Hearing Examiner Friedes in his report and therefore is not deemed of great significance.

On February 7, 1968, the Appellant, at the request of the Social Security Administration, was examined by Dr. Harvey Hayman of Syracuse, New York, a specialist in internal medicine. In his report (R63, p.93-95), Dr. Hayman concluded that Appellant suffered from "Chronic right otitis media, probably cholesteatoma" in his right ear and also stated that Appellant "has a severe anxiety neurosis which has been disabling for the past several years." It should be pointed out that Dr. Hayman's examination was just one examination of the Appellant's condition and of limited duration. In considering its weight, Dr. Hayman's examination should be contrasted with the years of familiarity with Appellant's medical condition experienced by Dr. Baum. See in this regard Skeen's v. Gardner 377 F.2d 405 (4th Cir.

1967). However, Dr. Hayman's report is significant in that he opines that Appellant has a mental problem "which has been disabling . . ." (emphasis mine). This is the first time that mental disability has been introduced into Appellant's medical record, and it certainly would be another complicating and disabling factor to consider in evaluating the evidence as to his ability to work.

On March 8, 1968, Appellant was seen by Dr. Sherwin Radin, a psychiatrist of Syracuse, New York. In his one-page report (R63, p.102), Dr. Radin found in Appellant "suggestions of strong repression of rage and hositility . . ." He further suggested that Appellant receive psychotherapy. Dr. Radin's psychological findings are further evidence of Appellant's having possible mental problems which certainly could be disabling and contributing to an overall disability condition. See Fairley v. Celebrezze, 315 F.2d 704 (3d Cir. 1967).

On March 22, 1968, in a second Social Security Disability Determination and Transmission (R63, p.27-28), the evidence in Appellant's case was again reviewed and the Examiner concluded that Appellant could go back to work as an inspector in a die casting factory. Again, it is noted that Hearing Examiner Friedes did not comment on this evaluation in his decision and therefore it is deemed of little or no significance on the present question. With regard to this particular Examiner's opinion that Appellant could return to work as an inspector in a die casting factory, it is interesting to note the physical demands for the "die castings" job as set forth in Page 48 of the transcript. Appellant had to life weight up to 50lbs. quite frequently, to three foot heights. Furthermore, he was required

to push up to 150 lbs. in weight all day long as far as a half a block. Also, he was required to stand all day long, walk some of the day, and do frequent stooping and bending and kneeling. It is difficult to see how the Examiner could conclude that the Appellant could go back to work in the light of Dr. Baum's reports.

Another summary report from Dr. Baum was submitted on January 3, 1969 (R63, p.89-90). It is similar to the report Dr. Baum submitted on September 15, 1967 (R63, p.86-87)

Dr. Baum again wrote a report concerning the Appellant's condition on February 4, 1969 (R63, p.91). He stated that: "There has not been any change since my last report . . ." and that Appellant "continues presenting the same symptoms and findings described by me in my report of 9/12/61. I continue treating him with bi-weekly injections of Pencillin and Streptomycin which is the only way to keep him half-way comfortable. Mr. Harrington has also continued having leg cramps and chest pains (angina pectoris) making it impossible for him to do any strenuous work. Under these circumstances, he is <u>not able to hold any kind of a job</u> and it is my opinion that <u>he should be considered 100% disabled."</u> (emphasis mine) Dr. Baum concluded his report by stating that "Whether or not this total disability is permanent cannot be decided as long as an active sickness process is causing his disability, and no way so far has been found to eliminate the origin of it, either by surgery or any other kind of treatment." Again, Dr. Baum reiterates and states positively his findings and conclusions that Appellant is continuing to suffer from the infectious conditions described earlier in this Brief and that he should be considered 100% disabled. Cer-

tainly this is substantial evidence in support of Appellant's claim for Social Security disability benefits.

In summary, the evidence of Appellant's medical condition subsequent to June 30, 1965, consists of treatment at the State University Hospital of New York, at the Veterans Administration Hospital both in 1967, continued reporting from 1967 to 1969 from his personal physician, Dr. Baum and reports of single examinations in early 1968 by Drs. Hayman and Radin. For the reasons which I have stated with regard to each of these reports, I see no indication within the record that there is substantial evidence supporting the Hearing Examiner's claim that Appellant is not totally disabled. Quite to the contrary, I find substantial evidence, especially in Dr. Baum's continued reports, and from the reports from the State University Hospital of New York and the Veterans Administration concerning Appellant's ear condition, and from Drs. Hayman and Radin's reports concerning possible mental problems, that Appellant was in fact totally disabled.

In reviewing the totality of the evidence, it must be kept in mind that whereas a single ailment may be described as "improved" (R63, p.65) Appellant's condition must be considered in its entirety and cumulative physical ailments can be equally as disabling as a single affliction. See Fairley v. Celebrezze, Supra.

It is therefore respectfully submitted that the record in this matter does not contain substantial evidence to support Hearing Examiner's Friedes' conclusion that Appellant was not totally disabled. To the contrary, the record contains substantial evidence that Appellant is in fact totally disabled and is entitled

to the disability benefits which he has been seeking since early in 1967.

It is also submitted that the Legal Services attorney whose advice the Appellant sought in requesting the hearing on his second application did not forcefully pursue Appellant's case. He waived Appellant's right to appear at the hearing and requested a determination on the evidence. Thus Appellant has never had his "day in court."

Also, the Legal Services attorney left Appellant's case to be decided on the record by a Hearing Examiner who may have been, however subconsciously, prejudiced by his decision that Appellant's claim should rightfully be dismissed on the grounds of res judicata. While the Examiner may have felt that he did objectively consider all the evidence in Appellant's case, he may also have subconsciously been attempting to demonstrate to Appellant that in any event his claim was not a valid one.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and Appellant be awarded disability benefits under Title II of the Social Security Act and such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

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May 15, 1974

CERTIFICATE OF SERIVCE

I hereby certify that on this 15th day of May, 1974, I served the foregoing Brief for Appellant by personally delivering two copies to Assistant U. S. Attorney Richard K. Hughes, Northern District of New York, Federal Building, Syracuse, New York.

Carleton B. Laidlaw, Jr.
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